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Telekom Malaysia Bhd v Obnet Sdn Bhd

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-97–11 OF 2022(W)
ABDUL RAHMAN SEBLI CJ (SABAH AND SARAWAK), HASNAH HASHIM AND ABDUL KARIM FCJJ
16 OCTOBER 2024

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Arbitration — Award — Validity — Arbitrator delivered oral decision on issue of liability and postponed hearing on assessment of damages to a date to be fixed — Whether oral decision of arbitrator was invalid and had no legal effect as it could not be enforced, set aside or form basis of reference in law — Whether D *Arbitration Act 2005 ('AA') did not enable arbitrator to make oral decision relating to 'substance of the dispute' between the parties — Whether determination of liability was a final and binding decision on a substance of dispute between the parties — Whether s 2 read with s 33 of AA deemed such determination an 'award' and mandatorily required it to be in writing*

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The respondent ('Obnet') had commenced arbitration proceedings against the appellant ('Telekom') in respect of a dispute between them. The arbitrator informed the parties that he would first decide the issue of liability, and only if liability was established would he hear and determine the issue of damages. F After hearing the respective parties on the issue of liability, the arbitrator gave an oral decision, supported with brief reasons, allowing Obnet's claim and Telekom's counterclaim on liability. He told the parties that he would not make a written award solely on the issue of liability but would publish a written award when the hearing on damages was completed. Telekom objected to the G arbitrator's stand which, it said, contravened ss 2 and 33 of the Arbitration Act 2005 ('the AA') and art 34 of the UNCITRAL Arbitral Rules (adopted by the KLRCA Arbitration Rules — now known as the AIAC Arbitration Rules 2021). Telekom applied to the High Court to, inter alia: (a) declare the arbitrator's oral decision on liability invalid; (b) restrain Obnet from taking any H further steps in the arbitration proceedings until the arbitrator had published a written award on the issue of liability; and (c) alternatively, stay the arbitration proceedings until the written award, as aforesaid, was handed down. The High Court dismissed the application, holding, inter alia, that nothing in the AA compelled the arbitrator to publish a written award with respect only to I liability. The court held that the AA gave the arbitrator the discretion to conduct the arbitration in any manner he deemed fit. The Court of Appeal ('COA') affirmed the High Court's decision and granted an injunction restraining Obnet from taking any further steps in the arbitration proceedings until Telekom's bid to appeal further to the Federal Court ('FC') was disposed

of. Leave was granted by the FC to Telekom to appeal against the COA's decision. A

Held, unanimously allowing the appeal, setting aside the decisions of the courts below and granting the prayers sought by Telekom in its application before the High Court: B

(1) The oral decision on liability in the instant case was a decision on 'the substance of the dispute' between the parties and was final and binding on the issue of liability. Section 2 read with s 33 of the AA mandatorily required the arbitrator to publish a written award with respect to his decision on liability. The arbitrator was not entitled to proceed with the determination of quantum until a written award on the issue of liability had been given as required under the AA. Without the written award, the arbitrator's oral decision on liability was invalid and of no legal effect as it could not be enforced, set aside or even form the basis for reference in law (see paras 34, 44 & 54). C D

(2) It was appropriate for a stay of the arbitration proceedings to be granted and for Obnet to be forthwith restrained from taking any further steps in the proceedings until the arbitrator had duly published a written award with regard to his determination on liability. As the arbitration had commenced in 2016 and the oral decision on liability was pronounced in 2020, it was incumbent upon the arbitrator to publish his written award on liability as soon as was reasonably possible (see paras 54–55). E F

(3) Section 2 of the AA defined an 'award' as being a decision of the arbitral tribunal on the 'substance of the dispute' and included any final, interim or partial award but not procedural or interlocutory orders. Section 33 of the AA, which must be read with s 2, provided, inter alia, that an award shall be made in writing stating the reasons upon which it was based unless certain exceptions applied (see paras 22–25). G

(4) It was unarguable that the arbitrator's decision on liability was a decision on the 'substance of the dispute' between the parties as far as liability was concerned. The arbitrator's decision to bifurcate the proceedings did not in any manner absolve him from the provisions of the AA. He had to comply with the provisions of the AA which mandated that when he delivered his decision on liability, that decision was an award which could be enforced under s 38 of the AA. The argument that it was not an award as the issue of quantum had yet to be determined was untenable. Article 34 UNCITRAL Arbitration Rules provided that the arbitral tribunal may make separate awards on different issues at different times. However, awards must be made in writing and shall be final and binding H I

on the parties. The arbitral tribunal shall state the reasons upon which the award was based unless parties had agreed that no reasons need to be given (see para 36).

(5) Section 33(1) of the AA excluded the possibility of the arbitrator making an oral award. An award other than in the form prescribed in the section was necessarily invalid. The AA did not recognise an oral award as there was no express provision enabling an arbitrator to give an oral decision on matters which were the 'substance of the dispute'. Thus, a decision on matters which were the substance of the dispute must be an award and that award must be in writing and duly signed. The form and contents of the award must satisfy the requirements of s 33 of the AA notwithstanding the arbitrator's decision to bifurcate the proceedings (see para 37).

(6) Without a valid decision on liability, the parties to the dispute and the arbitral tribunal could not proceed with the assessment of damages. The AA did not give the discretion to defer or delay publication of an award. Furthermore, the publication of an award on liability was necessary to ensure that the arbitral tribunal was functus officio on the issue of liability (see para 46).

[Bahasa Malaysia summary

Responden ('Obnet') telah memulakan prosiding timbang tara terhadap perayu ('Telekom') berkenaan dengan pertikaian antara mereka. Penimbang tara memaklumkan kepada pihak-pihak bahawa dia akan terlebih dahulu memutuskan isu liabiliti, dan hanya jika liabiliti diputuskan barulah dia akan mendengar dan menentukan isu ganti rugi. Selepas mendengar setiap pihak mengenai isu liabiliti, penimbang tara memberikan keputusan lisan, disokong dengan alasan ringkas, membenarkan tuntutan Obnet dan tuntutan balas Telekom mengenai liabiliti. Beliau memberitahu pihak-pihak bahawa beliau tidak akan membuat award bertulis semata-mata berhubung isu liabiliti tetapi akan mengeluarkan award bertulis apabila pendengaran mengenai ganti rugi selesai. Telekom membantah pendirian penimbang tara yang, katanya, melanggar ss 2 dan 33 Akta Timbang Tara 2005 ('ATT') dan perkara 34 Kaedah Timbang Tara UNCITRAL (yang diterimapakai oleh Kaedah Timbang Tara KLRCA — kini dikenali sebagai Kaedah Timbang Tara AIAC 2021). Telekom memohon kepada Mahkamah Tinggi untuk, antara lain: (a) mengisytiharkan keputusan lisan penimbang tara mengenai liabiliti tidak sah; (b) menghalang Obnet daripada mengambil sebarang langkah lanjut dalam prosiding timbang tara sehingga penimbang tara telah mengeluarkan award bertulis mengenai isu liability; dan (c) sebagai alternatif, menggantung prosiding timbang tara sehingga award bertulis, seperti yang dinyatakan sebelum ini, dikeluarkan. Mahkamah Tinggi menolak permohonan itu, dengan memutuskan, antara lain, bahawa tiada apa-apa dalam ATT yang memaksa penimbang tara untuk mengeluarkan award bertulis berkenaan

dengan liabiliti sahaja. Mahkamah memutuskan bahawa AA memberi budi bicara kepada penimbang tara untuk menjalankan timbang tara dalam apa-apa cara yang difikirkannya sesuai. Mahkamah Rayuan ('MR') mengesahkan keputusan Mahkamah Tinggi dan membenarkan injunksi yang menghalang Obnet daripada mengambil sebarang langkah lanjut dalam prosiding timbang tara sehingga cubaan Telekom untuk merayu lanjut ke Mahkamah Persekutuan ('MP') telah dilupuskan. Kebenaran telah dibenarkan oleh MP kepada Telekom untuk merayu terhadap keputusan MR.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan keputusan mahkamah di bawah dan membenarkan prayer yang dimohon oleh Telekom dalam permohonannya di hadapan Mahkamah Tinggi:

(1) Keputusan lisan mengenai liabiliti dalam kes semasa adalah keputusan mengenai 'isu pertikaian' antara pihak-pihak dan adalah muktamad dan mengikat mengenai isu liabiliti. Seksyen 2 dibaca bersama s 33 ATT secara mandatori menghendaki penimbang tara untuk mengeluarkan award bertulis berkenaan dengan keputusannya mengenai liabiliti. Penimbang tara tidak berhak untuk meneruskan dapatan kuantum sehingga award bertulis mengenai isu liabiliti telah diberikan seperti yang dikehendaki di bawah ATT. Tanpa award bertulis, keputusan lisan penimbang tara mengenai liabiliti adalah tidak sah dan tidak mempunyai kesan undang-undang kerana ia tidak boleh dikuatkuasakan, diketepikan malah menjadi asas untuk rujukan dalam undang-undang (lihat perenggan 34, 44 & 54).

(2) Ia adalah wajar untuk penggantungan prosiding timbang tara diberikan dan untuk Obnet dengan serta-merta dihalang daripada mengambil apa-apa langkah selanjutnya dalam prosiding itu sehingga penimbang tara telah mengeluarkan dengan sewajarnya suatu award bertulis berkenaan dengan dapatannya mengenai liabiliti. Memandangkan timbang tara telah dimulakan pada tahun 2016 dan keputusan lisan mengenai liabiliti telah dibuat pada tahun 2020, ia adalah menjadi tanggungjawab penimbang tara untuk menerbitkan award bertulisnya mengenai liabiliti secepat mungkin (lihat perenggan 54–55).

(3) Seksyen 2 ATT mentakrifkan 'award' sebagai keputusan tribunal timbang tara mengenai 'isu pertikaian' dan termasuk apa-apa award muktamad, interim atau sebahagian tetapi bukan perintah prosedur atau interlokutori. Seksyen 33 ATT, yang harus dibaca dengan s 2, dengan syarat, antara lain, bahawa award hendaklah dibuat secara bertulis dengan menyatakan alasan ia diasaskan melainkan pengecualian tertentu digunakan (lihat perenggan 22–25).

(4) Ia tidak boleh dipertikaikan bahawa keputusan penimbang tara mengenai liabiliti adalah keputusan mengenai 'isu pertikaian' antara pihak-pihak setakatmana berkenaan dengan liabiliti. Keputusan

penimbang tara untuk membahagikan prosiding tidak dalam apa-apa cara membebaskannya daripada peruntukan ATT. Dia perlu mematuhi peruntukan ATT yang memberi mandat bahawa apabila dia menyampaikan keputusannya mengenai liabiliti, keputusan itu adalah satu award yang boleh dikuatkuasakan di bawah s 38 ATT. Hujah bahawa ia bukan award kerana isu kuantum masih belum ditentukan adalah tidak dapat dipertahankan. Perkara 34 Kaedah-Kaedah Timbang Tara UNCITRAL menyatakan bahawa tribunal timbang tara boleh membuat award berasingan mengenai isu yang berbeza pada masa yang berbeza. Walau bagaimanapun, award mesti dibuat secara bertulis dan adalah muktamad dan mengikat pihak-pihak. Tribunal timbang tara hendaklah menyatakan sebab-sebab award itu diasaskan melainkan pihak-pihak telah bersetuju bahawa tiada alasan perlu diberikan (lihat perenggan 36).

(5) Seksyen 33(1) ATT mengecualikan kemungkinan penimbang tara membuat award lisan. Satu award selain daripada borang/bentuk yang ditetapkan dalam seksyen itu semestinya tidak sah. ATT tidak mengiktiraf award lisan kerana tiada peruntukan nyata yang membolehkan penimbang tara memberi keputusan lisan mengenai perkara yang menjadi 'isu pertikaian'. Oleh itu, keputusan mengenai perkara yang menjadi intipati pertikaian mestilah merupakan satu award dan award itu mestilah secara bertulis dan ditandatangani dengan sewajarnya. Bentuk dan kandungan award mesti memenuhi keperluan s 33 ATT walaupun keputusan penimbang tara untuk membahagikan prosiding (lihat perenggan 37).

(6) Tanpa keputusan yang sah mengenai liabiliti, pihak-pihak kepada pertikaian dan tribunal timbang tara tidak boleh meneruskan taksiran ganti rugi. ATT tidak memberikan budi bicara untuk menggantung atau menangguhkan pengeluaran award. Tambahan pula, pengeluaran award mengenai liabiliti adalah perlu untuk memastikan bahawa tribunal timbang tara adalah functus officio pada isu liabiliti (lihat perenggan 46).]

Cases referred to

Far East Holding Bhd & Anor v Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals [2018] 1 MLJ 1; [2018] 1 CLJ 693, FC (refd)

Haris Fatillah bin Mohd Ibrahim v Suruhanjaya Pilihan Raya Malaysia [2017] 3 MLJ 543; [2017] 3 CLJ 88, CA (refd)

IMPSA (M) Sdn Bhd v Bank Muamalat Malaysia Berhad & Ors [2011] MLJU 1535; [2011] 1 LNS 729, HC (refd)

Lee Eng Eow (as Director of Lee Guat Cheow & Co Sdn Bhd) v Mary Lee (as Executrix of the Estate of Low Ai Lian) & ORS [1999] 3 MLJ 481; [1999] 3 CLJ 143, CA (refd)

MCIS Insurance Bhd v Associated Cover Sdn Bhd [2001] 2 MLJ 561, HC (refd)

PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA [2006] SGCA 41, CA (refd)

Legislation referred to

Arbitration Act 2005 ss 2, 3, 8, 21, 31(1), 32, 33, 33(1), (3), 37, 38
Rules of Court 2012 O 7 r 3

Appeal from: Originating Summons No WA-24NCC(ARB)-22–07 of 2020 (High Court, Kuala Lumpur)

Lambert Rasa-Ratnam (with Chan Mun Yew, Nicole Shieh E-Lyn and James Lau Jian Hui) (Lee Hishammuddin Allen & Gledhill) for the appellant.
S Murthi (with Vivekkhapriya a/p Regunathan) (S Murthi & Assoc) for the respondents.

Hasnah Hashim FCJ (delivering judgment of the court):

[1] The appeal raised questions about the significance and the enforceability of oral pronouncements by an arbitral tribunal in bifurcated arbitration proceedings governed by the Arbitration Act 2005 ('the AA 2005') and KLRCA Arbitration Rules, now known as the AIAC Arbitration Rules 2021 ('the Rules 2021'). In particular, whether an oral decision by an Arbitral Tribunal on liability being a decision on the substance of a dispute, is a valid decision within the meaning of the AA 2005. We heard oral submissions by all learned counsels representing the respective parties and at the end of those submissions we indicated that we needed time to consider the respective submissions. We have now reached our decision and what follows below are our deliberations on the issues raised and our reasons as to why we have so decided.

[2] On 3 November 2022, Telekom Malaysia Bhd ('Telekom') obtained leave to appeal on the following question of law:

> Where an arbitral tribunal directs proceedings be bifurcated (with liability to be heard and decided first followed by determination of quantum, if liability is established), whether an oral pronouncement by the arbitral tribunal on liability is sufficient to (i) amount to a decision on liability and (ii) entitle the arbitral tribunal and parties to proceed with a determination of quantum, in a case where the arbitration is governed by —
>
> (a) the Arbitration Act 2005 (AA 2005); and
>
> (b) the KLRCA Arbitration Rules (AIAC Arbitration Rules 2021).

A FACTUAL BACKGROUND

[3] In 2003, the Selangor State Government ('the state government') awarded a project to the respondent, Obnet Sdn Bhd ('Obnet'), to connect all state government departments, statutory bodies, municipals/local authorities, government-linked companies and government agencies via a high-speed broadband network ('SELNET project'). Two agreements were executed between Obnet and the state government, that is, the Selangor broadband internet access agreement dated 10 October 2003 and the subscription agreement dated 23 September 2005 ('SELNET agreements').

[4] Obnet appointed Telekom, the appellant in this appeal, as an independent contractor to design and build a network infrastructure for the SELNET project in 2007. This resulted in a metro ethernet services agreement (Metro-E agreement) executed between Obnet and Telekom on 19 April 2007. The Metro-E agreement contains an arbitration agreement clause stipulating that any disputes arising out of or in connection with the Metro-E agreement shall be referred to arbitration under the KLRCA Rules.

[5] Unfortunately, a dispute arose between Obnet and the state government in 2008 regarding the provision of sites under the SELNET project which resulted in the termination of the SELNET agreements on 10 September 2009. The Metro-E agreement with Telekom was also terminated on 30 September 2009.

[6] Unhappy with the termination, Obnet commenced arbitration proceedings against Telekom alleging, inter alia, that Telekom had unlawfully interfered with and used confidential information obtained from the SELNET project to provide its own network services to the state government. This ultimately resulted in the state government terminating the SELNET agreements. Telekom counterclaimed and claimed for the sums due and owing by Obnet under the Metro-E agreement.

[7] Parties referred the disputes to arbitration and Dato Hj Azmel bin Hj Maamor, a retired judge, was appointed as the arbitrator ('the arbitrator') to resolve the dispute between the parties. the arbitrator decided to bifurcate the arbitration proceedings, that is, firstly, the determination on the issue of liability, and thereafter once liability has been established, he will hear and determine the issue of damages in respect of the claim and/or the counterclaim. The mode of the hearing was reiterated by the arbitrator during the hearing on 25 October 2016 when evidence in respect of liability was heard.

[8] Almost four years after the arbitration commenced, on 26 June 2020, the arbitrator orally informed the parties that he allowed Obnet's claim and

Telekom's counterclaim. the arbitrator notified the parties that he would not publish a written award at this stage. Via letters dated 6 July 2020 and 13 July 2020, Telekom's solicitors wrote to the arbitrator requesting for an award to be published in accordance with ss 2 and 33 of the Arbitration Act, and art 34 of the UNCITRAL Arbitral Rules (adopted by the KLRCA Rules).

[9] Obnet, however, objected to Telekom's request and took the position that:

(a) the oral decision was not meant to be an award. It is merely an interlocutory order/ruling made in the course of the arbitration proceedings; and

(b) that the arbitrator, being the master of its procedure, has discretion on whether to issue an interim award with respect to liability or otherwise.

[10] Vide letter dated 16 July 2020, the arbitrator notified the parties that there is no requirement for an award to be published at that juncture. On the last day of oral submissions on 4 February 2020, the arbitrator informed the parties that he would deliver its decision on liability on 16 April 2020. This was subsequently adjourned to 26 June 2020 due to the Movement Control Order. On 26 June 2020, the arbitrator informed the parties orally that Obnet's claim and Telekom Malaysia's counterclaim were allowed. The arbitrator gave brief reasons for its decision and that an award on liability would not be published at this stage. Telekom's solicitors subsequently wrote to the Arbitral Tribunal on 6 July 2020 and 13 July 2020 requesting that an award on liability be published in accordance with ss 2 and 33 of the AA 2005 and art 34 of the UNCITRAL Arbitration Rules. Obnet, however, objected to Telekom's request. In their letter dated 9 July 2020, they took the position that the oral decision was not meant to be an award and was merely an interlocutory order/ruling made in the course of the arbitral proceedings.

[11] On 16 July 2020, the arbitrator informed the parties that there is no requirement for an award to be published and that the practice in the High Court should be followed, where a written judgment is only published at the conclusion of the hearing on quantum. Obnet's solicitors subsequently wrote to the Arbitral Tribunal to request for directions in respect of the hearing on the assessment of damages and for hearing dates to be fixed.

DECISION OF THE HIGH COURT AND THE COURT OF APPEAL

[12] Dissatisfied with the approach taken by the arbitrator, Telekom filed an Originating Summons No WA-24NCC(ARB)-22–07 of 2020 ('OS') at the Kuala Lumpur High Court seeking, amongst others, for:

(a) a declaration that the oral decision in respect of Telekom's and the Obnet's liability is invalid;

(b) an order to restrain Obnet from taking any further steps to proceed with the arbitration proceedings between the parties until the Arbitral Tribunal duly publishes an award on its determination on the issue of liability of the parties in respect of the claim and counterclaim;

(c) an interim injunction to restrain Obnet from taking any further steps to proceed with the arbitration proceedings pending the disposal of the OS; and

(d) alternatively, an order that the arbitration proceedings be stayed pending the issuance of a written award in respect of liability by the Arbitral Tribunal.

[13] After hearing arguments, the learned High Court judge dismissed the OS. On the failure by Telekom to state the relevant provisions in the intitulement of the OS, Her Ladyship was of the view that the failure to state ss 2 and 3 of the Arbitration Act in the intitulement was a mere irregularity and not a nullity. Obnet was not at all taken by surprise as the said sections were stated and referred to in the body of the OS, namely, in prayer (2) and (4) of the OS. Further, Obnet failed to demonstrate that they were prejudiced or that failure to state the relevant provisions in the intitulement caused any miscarriage of justice. She explained in her grounds of judgment:

> [28] In this instant case although ss 2 and 3 of the Arbitration Act were not stated in the intitulement, this court is of the view the defendant is not at all taken by surprise because the said sections are stated and referred to in the body of the OS, namely, in prayer (2) and (4) of the OS. Importantly, the defendant did not demonstrate that they are being prejudiced by the plaintiffs failure to state both the said sections in the intitulement or that it has caused a miscarriage of justice.

[14] In respect of Telekom's complaint that the arbitrator failed to publish a written award in respect of the oral decision, the High Court judge opined that the OS as it is worded had not pleaded any cause of action against the Obnet as required by O 7 r 3 of the Rules of Court 2012 ('the ROC'). Furthermore, Telekom had sought injunctive relief against Obnet. Her Ladyship observed that it is trite law that injunction is not a cause of action (re: *Lee Eng Eow (as Director of Lee Guat Cheow & Co Sdn Bhd) v Mary Lee (as Executrix of the Estate of Low Ai Lian) & ORS* [1999] 3 MLJ 481; [1999] 3 CLJ 143; *IMPSA (M) Sdn Bhd v Bank Muamalat Malaysia Berhad & Ors* [2011] MLJU 1535; [2011] 1 LNS 729). The OS failed to state a reasonable cause of action against Obnet and, therefore, must be dismissed.

[15] For completeness, the learned High Court judge discussed the merits of the OS. Prayer 1 of the OS sought a declaration that the decision given by the

arbitrator orally was invalid. Her Ladyship cited the case of *Haris Fatillah bin Mohd Ibrahim v Suruhanjaya Pilihan Raya Malaysia* [2017] 3 MLJ 543; [2017] 3 CLJ 88, where the Court of Appeal held that the most important feature of a declaratory judgment is that it is a discretionary remedy and the court must therefore carefully consider the circumstances and terms upon which the relief is sought.

[16] The learned High Court judge further articulated in her grounds of judgment that by virtue of s 21 of the AA 2005, the arbitrator is vested with the discretion to determine the manner the arbitration proceedings is to be conducted. There was no evidence before the court to indicate that when the arbitrator decided to bifurcate the arbitration proceedings, the arbitrator must deliver a written award after the hearing on liability was completed.

[17] Telekom requested for the award on liability to be made on the day the arbitrator delivered his oral decision on liability on 26 June 2020 followed by a subsequent request in writing sometime in July 2020. The ruling to bifurcate the arbitration proceedings was made in September 2016 when the proceedings commenced. The High Court judge accepted and agreed with the arguments advanced by Obnet that Telekom could not insist on a written award to be delivered on the issue of liability as there was no complaint that the decision of the arbitrator to decide on the issue of liability first and published one final award after completion of the assessment of damages has breached the rule of natural justice.

[18] Her Ladyship further explained that the Act does not require the arbitrator to immediately publish his award after determining the issue of liability. Therefore, she concluded that Telekom is estopped from insisting for the written award of the oral decision. The issue of estoppel cannot be raised to negate the operation of a statutory provision as the Act does not prohibit the issuance of one final award at the end of the arbitration proceedings.

[19] The Court of Appeal agreed with the High Court judge and affirmed the High Court judge's decision. Unfortunately, there are no written grounds of judgment of the Court of Appeal. On the application of Telekom Malaysia, the Court of Appeal on 15 June 2022 granted an Erinford injunction to restrain Obnet from taking any steps in the arbitral proceeding pending the disposal of Telekom application for leave to appeal and the appeal, if leave is granted.

OUR ANALYSIS AND DETERMINATION

Whether an oral decision given by the arbitrator is an award

[20] In this appeal, the central issue for our determination is whether the oral decision given by the arbitrator is an award as envisaged under the AA 2005. On the facts, the arbitrator had decided on liability and found that Obnet had proven its case and Telekom had proven its counterclaim. However, having decided on liability, the arbitrator intends to publish one final award after the conclusion of the hearing on damages following the practice of the civil courts.

[21] The AA 2005 is based on the Model Law on International Commercial Arbitration described as the Model Law reforming the law relating to domestic arbitration as well as international arbitration extending to the recognition and enforcement of awards and related matters.

[22] Section 2 of the AA 2005 defined 'Award' as being:

> ... a decision of the arbitral tribunal on the substance of the dispute and includes any final, interim or partial award and any award on costs or interest but does not include interlocutory orders ...

[23] Under s 2 of the AA 2005 there can only be two types of decisions that can be delivered by an arbitral tribunal, that is

(a) a decision on the substance of dispute — which constitutes an award and must be delivered in the form prescribed for an award; or

(b) a decision on procedural or interlocutory matters.

[24] The definition of an award under s 2 of the AA 2005 extends to a decision on the substance of the dispute, whether it is made as a final, interim or partial decision. The definition of an award under s 2 of the AA 2005 must be read with s 33 of the same Act mandating the form and content of an award:

(1) an award shall be made in writing and subject to subsection (2) shall be signed by the arbitrator;

(2) in arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall be sufficient provided that the reason for any omitted signature is stated.

(3) An award shall state the reasons upon which it is based, unless —

(a) the parties have agreed that no reasons are to be given; or

(b) the award is an award on agreed terms under section 32.

(4) An award shall state its date and the seat of arbitration as determined in accordance with section 22 and shall be deemed to have been made at that seat.

(5) After an award is made, a copy of the award signed by the arbitrator in accordance with subsections (1) and (2) shall be delivered to each party.

(6) Subject to subsection (8), unless otherwise agreed by the parties, the arbitral tribunal may, in the arbitral proceedings before it, award simple or compound interest from such date, at such rate and with such rest as the arbitral tribunal considers appropriate, for any period ending not later than the date of payment of the whole or any part of —

(a) any sum which is awarded by the arbitral tribunal in the arbitral proceedings;

(b) any sum which is in issue in the arbitral proceedings but is paid before the date of the award; or

(c) costs awarded or ordered by the arbitral tribunal in the arbitral proceedings.

(7) Nothing in subsection (6) shall affect any other power of an arbitral tribunal to award interest.

(8) Where an award directs a sum to be paid, that sum shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt.

[25] Section 31(1) of the AA 2005 expressly stipulates that an award must be made in writing and further provides as stated under s 33(3) of the same Act that an award shall state the reasons upon which it is based. The only exceptions are if the parties agree that no reasons ought or need to be given or the award is an award on agreed terms under s 32 of the AA 2005.

[26] The learned High Court judge however, opined that since there is no expressed provision in the Act as to when a written award is to be delivered, in particular where bifurcation of proceedings is adopted the arbitrator cannot be compelled to deliver his decision prior to the completion of the arbitration proceeding which in this case would be until the completion of the assessment of damages. Therefore, in the absence of any provision in the Act, the failure of an arbitrator to deliver one final award after the completion of the arbitration proceedings is not a violation of the Act. The Act does not have any restriction if the arbitrator decides to deliver an oral decision. Furthermore, the subject matter of the oral decision does not fulfil the criteria of an award in so far as the form and content as stipulated in s 33 of the Act.

[27] The learned judge further reasoned that it was premature for Telekom even to speculate that its rights would be infringed. Furthermore, Telekom did not raise any complaint before the arbitrator that they could not proceed with the hearing on quantum because there was no written award published by the arbitrator.

[28] Her Ladyship was of the considered view that the continuation of the arbitration proceeding in relation to the quantum of damages would not be

oppressive, vexatious and unconscionable. Restraining the arbitration proceeding would delay the hearing of the assessment of damages and the arbitration proceedings which commenced in 2016. Furthermore, there must be minimal intervention by the court as stipulated in the AA 2005. Premised on the reasons stated above, the equitable relief sought for injunction was refused. The burden is on Telekom to show special circumstances which warrant this court to exercise its discretion to grant a stay. Telekom failed to do so, and thus the application was dismissed.

[29] The pertinent question for determination before this court deals with a fundamental point of importance in an arbitration commenced under the AA 2005 and the Rules 2021. In essence, whether an oral decision by an arbitral tribunal on liability is a decision on the substance of a dispute is a valid decision within the meaning of the Act and the Rules.

[30] On 16 July 2020, the arbitrator informed the parties there was no requirement for an award to be published after he had delivered his oral decision on liability. the arbitrator opined that the practice in the High Courts should be followed, where a written judgment is only published at the conclusion of the hearing on quantum. The issue is whether to constitute a valid decision on the substance of a dispute, in this case, on liability, must the decision of the arbitral tribunal/arbitrator be delivered in the form of an 'Award', within the meaning of s 33 of the AA 2005.

[31] The provision of s 2 of the AA 2005 is plain and unambiguous that is, the decision of an arbitrator on the 'substance of the dispute' constitutes an award whether it is a final, interim or partial award and any award on costs or interest. However, as the law expressly provides it does not include interlocutory orders. Interlocutory orders by the arbitrator deal with procedural issues such as scheduling of hearings, security for costs, and discovery etc. In his book *UNCITRAL Model Law & Arbitration Rules, The Arbitration Act 2005 (Amended 2011 & 2018)* and *The AIAC Arbitration Rules 2018* (Sweet & Maxwell 2018) pp 57 and 58, Datuk Professor Sundra Rajoo explained that the definition of 'award' in s 2 lays down the test to be employed by courts in ascertaining whether an arbitral tribunal's decision is an award, interlocutory order or otherwise. The important test is that the decision must relate to the substance of the dispute. The main purpose of the test is to distinguish awards from procedural orders. An award as defined under the Act must relate to the substantive legal rights and duties of the parties.

[32] Therefore, an order of a procedural nature is not an award as envisaged under the Act. An award can either be final, interim or partial, and, irrespective of the type of award, the award must necessarily have the effect of finality on the

issue it disposes. In the appeal before us the determinative issue decided by the arbitrator is that of the liability of the parties to the dispute.

[33] His Lordship KC Vohrah J (as he then was) in *MCIS Insurance Bhd v Associated Cover Sdn Bhd* [2001] 2 MLJ 561 referred to *Halsbury's Laws of Singapore*, Vol 2 at 83, para [20.095] that an award is final in its terms in that in so far as it relates to the issues decided therein it is final whatever one might call the award. The relevant passage reads as follows:

> [20.095] 'Interim', 'partial' and 'interlocutory' The terms 'interim', 'partial' and 'interlocutory' have no statutory definition. All awards are final in their terms in that in so far as relating to the issues decided therein, they are final. In practice, the term 'interim award' is generally used to describe any award that is not final (last) award in the arbitration. Decisions on issues of the applicable proper law, time-bar defences, joinder of parties and arbitral jurisdiction have been described as interim awards, as have awards made on part of the claims only, either on the basis of admission or following a decision of a part only of the issues in dispute. The terms 'partial award' is sometimes used to describe awards on part of the claims only. An interlocutory award would normally be an award that deals with certain issues such as liability (being final on the issue) leaving quantum to be further assessed. Partial awards and interlocutory awards could also be termed 'interim awards'. An award dealing with all the issues in the claim and the counterclaim but leaving the issue of costs to be argued is nevertheless often termed an interim award.

[34] Section 33(1) of the AA 2005 mandates that the award must be made in writing. If the award is not in writing, it cannot be enforced, set aside or even form the basis for reference of law. In this case, on the facts the arbitrator has decided on liability which means that he has decided issues relating to a substantive dispute on liability. As far as liability is concerned, it is final and binding.

[35] The Singapore Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41 held that the nomenclature or label used by the arbitral tribunal to describe its decision is irrelevant. What is important is whether the decision delivered by the arbitrator is a decision on the substance of the dispute. The words 'substance of the dispute' distinguish procedural and practical matters on one hand, and substantive matters affecting the rights of the parties on the other. It must be contrasted with orders and directions that address the procedural aspects of arbitration.

[36] Under the Model Law, there is no concept of an arbitral tribunal delivering a decision on the substance of dispute, in any form other than an award. It is unarguable that an arbitral tribunal's decision on liability is a decision on the substance of the dispute as it determines a substantive issue between parties to the arbitration, and the parties' legal rights and obligations. Any other interpretation would be absurd. the arbitrator's decision to bifurcate

A the proceedings does not in any manner absolve him from the provisions of the Act. Thus, he must comply with the provisions of the Act mandating him as an arbitrator that when he delivers his decision on liability that decision is an award under which can be enforced under s 38 of the Act. The argument that it was not an award as the issue of quantum had yet to be determined is
B untenable. Article 34 of the UNCITRAL Arbitration Rules provides that the arbitral tribunal may make separate awards on different issues at different times. However, awards must be made in writing and shall be final and binding on the parties. The arbitral tribunal shall state the reasons upon which the award is based unless the parties have agreed that no reasons are to be given.
C Therefore, any decision of an arbitral tribunal, in this case, the arbitrator on the substance of a dispute which does not comply with the mandatory requirements of s 33 of the Act must be regarded as being invalid.

D **[37]** Section 33(1) of the AA 2005 excludes the possibility of the arbitrator making an oral award. An award other than in the form prescribed in the section will necessarily be invalid. Once again, we have to examine the provisions of the AA 2005. The AA 2005 does not recognise an oral award as being an award as there is no expressed provision enabling an arbitrator to give
E an oral decision on matters which are the substance of the dispute. Thus, a decision on matters which are the substance of the dispute must be an award and that award must be in writing and duly signed. The form and contents of the award must satisfy the requirements as provided under s 33 of the AA 2005 notwithstanding the decision by the arbitrator to bifurcate the proceedings.

F **[38]** Datuk Professor Sundra Rajoo in his book *Law, Practice and Procedure of Arbitration* (2nd Ed) (LexisNexis 2016) p 580 said:

> Most arbitral institution rules do require the award to be in writing. The writing requirement has not given rise to any dispute in Malaysia and Singapore ... Conversely, no arbitral tribunal will attempt to render an oral award in the style of
G the court rendering its decision orally or reading out its judgment. The old common law rule which permitted oral awards is no longer applicable. The Arbitration Act 2005 does not apply to oral awards.

H **[39]** He further explains in his book that the classification of an arbitral tribunal's decision as an award or otherwise is important as it will determine whether such a decision is enforceable or susceptible to intervention by the courts or whether it is binding on parties and the arbitral tribunal; and finally, the extent of which an arbitral tribunal can validly recall or vary such decision.

I **[40]** Section 2 of the AA 2005 expressly excludes 'interlocutory orders' from the definition of awards. 'Interlocutory orders' by the arbitral tribunal deal with procedural issues such as scheduling hearings, security for costs, and discovery etc. An award must be interpreted to mean a final determination of a particular

issue or claim in the arbitration and must be contrasted with orders and directions which address the procedural aspects in an arbitration proceeding. The oral decision by the arbitrator in the appeal before us is clearly not an interlocutory order but a final determination on liability in the dispute between Telekom and Obnet.

[41] Section 8 of the AA 2005 reads:

> No court shall intervene in matters governed by this Act, except where so provided in this Act.

[42] The statutory regime of the AA 2005 intends minimal intervention by the courts. Jeffery Tan FCJ delivering the majority judgment of the Federal Court in *Far East Holding Bhd & Anor v Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals* [2018] 1 MLJ 1; [2018] 1 CLJ 693 observed:

> The principle of minimal interference by the court, which is an ingrained aspect of the UNCITRAL Model Law on International Commercial Arbitration, is reflected in s 8. That principle was accepted in *Perwira Bintang*, *Government of the Lao People's Democratic Republic v Thai-Lao Lignite Co Ltd (' TLL'), a Thai Co & Anor* [2013] 3 MLJ 409; [2013] CLJU 83; [2013] 1 LNS 83; [2014] 2 AMR 375, *Ajwa For Food Industries, Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2009] MLJU 793; [2010] 5 CLJ 83, *Rmarine Engineering (M) Sdn Bhd v Bank Islam Malaysia Bhd* [2012] MLJ 453; [2012] 7 CLJ 540, and *Chain Cycle*. The model law requires recognition of the principles of party autonomy, minimal court intervention and international harmonisation of laws.

[43] To ensure minimal intervention or ideally no intervention at all by the courts, the AA 2005 sets out the procedures which must be followed and complied with not only by the arbitrator but also by the parties involved in the arbitration. Under the AA 2005 an award by an arbitrator whether interim or final must be in writing giving reasons for its decision. Generally, the courts will not intervene in arbitral proceedings which is the domain of the arbitrator. There is also no requirement under the AA 2005 and the Rules 2021 that empowers an arbitral tribunal to mimic or adopt court procedures as what happened in this appeal before us. the arbitrator must, therefore at all times comply strictly with the provisions of the AA 2005.

[44] We, therefore, agree with the arguments advanced by learned counsel for Telekom that having found that the arbitrator's decision on liability amounts to a decision on the 'substance of the dispute', the High Court and Court of Appeal ought to have held the decision must be published in the form of an award as mandatorily required by ss 2 and 33 of the AA 2005 for it to be valid and have any legal effect. The High Court and Court of Appeal erred in holding that the Act does not prescribe a timeline for an award to be published

A and that the arbitrator can publish an award on liability at the end of arbitral proceedings.

B **[45]** After giving much consideration to this issue, we are satisfied that there is a good deal of substance in the argument put forward by learned counsel for Telekom that a decision on liability is a decision on the substance of the dispute and thus an award under the Act. We reiterate that the AA 2005 excludes the possibility of the arbitrator delivering an oral award. Undeniably, the arbitrator is the master of the arbitration proceedings and can decide to bifurcate the proceedings or otherwise. However, the provisions of the AA 2005 must be C strictly complied and the arbitrator must carry out his functions and duties as expressly required under the Act. The arbitrator is required to give a sufficiently reasoned award to demonstrate the reasons for the decision and more importantly, as a prerequisite for any appeal against the arbitral tribunal's decision. Further with a written award, there will be certainty for the parties to D proceed with the next stage of the arbitration. Thus, any failure to comply is a violation of the Act and will taint any decision made by an arbitrator.

E **[46]** Without a valid decision on liability, the parties to the dispute and the arbitral tribunal cannot proceed with the assessment of damages. The AA 2005 does not give the discretion to defer or delay publication of an award. Furthermore, the publication of an award on liability is necessary to ensure the arbitral tribunal is functus officio on the issue of liability.

F **[47]** As alluded to earlier, the decision on the substance of the dispute must be published in the form of an award, as mandatorily required by ss 2 and 33 of the AA 2005, for it to be valid and have any legal effect. The moment the arbitrator delivers his decision as what had transpired in this appeal before us, the arbitrator is functus officio on the issue of liability. Had the High Court G judge carefully examined the provisions of the AA 2005, she could not have concluded that an arbitrator can deliver an oral decision.

[48] In conclusion, and based on the reasons we have articulated, the oral pronouncement made by the arbitrator on liability is the final determination H on liability. Henceforth, the arbitrator must comply with the requirements of the AA 2005 and must publish a written award.

INJUNCTION

I **[49]** Injunctions can be granted to restrain arbitration in situations where:

> It does not cause any injustice to the parties in an arbitration and where if an injunction is not granted the continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process. The Federal Court in *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1 approved the higher

threshold test as stated in J *Jarvis and Sons Ltd v Blue Circle Dartford Estates Ltd* to injunct an arbitration as follows:

> The J Jarvis line of cases, parties seeking an injunction to restrain arbitration proceedings are the contracting parties to the arbitration agreement. This feature and distinction are crucial. In such cases, where a party to arbitral proceedings seeks to restrain the continuance of the arbitration proceedings a higher or different test or threshold imposed would be a logical and sensible requirement given the contractual obligations entered into by the party seeking to restrain the arbitral proceedings.

[50] Learned counsel for Telekom argued that Telekom has a statutory right to immediately apply to set aside an award on liability under s 37 of the AA 2005 without waiting for the assessment of damages to be heard. Obnet's insistence on assessing damages without an award of liability is, therefore, a plain denial of Telekom's rights under the Act.

[51] We have given our utmost consideration to the submissions of learned counsels as well as the authorities cited and, we have carefully perused the grounds of judgment of the learned judge we are satisfied that the balance of convenience lies in favour of Telekom to safeguard their rights under the Act.

[52] The arbitrator had delivered his decision on liability and must provide as mandated by the Act a written award before commencing the assessment of damages. We agree with the submissions of learned counsel for Telekom that without an award on liability, it would be a plain denial of Telekom's rights under the AA 2005. An interim injunction is, therefore, necessary to restrain Obnet from taking any further steps to proceed with the arbitration proceedings and that the arbitration proceedings be stayed pending the issuance of a written award.

CONCLUSION

[53] Having carefully considered the submissions and authorities of all parties and based on the aforementioned reasons and in the light of the above settled principles we found merits in the issues raised by the appellant. We, therefore, allow the appeal with costs to Telekom as the appellant. We set aside the decisions of the Court of Appeal and the High Court.

[54] We answer the question posed before us in the following manner. Where an arbitral tribunal, in this case, the arbitrator, directs proceedings to be bifurcated, an oral pronouncement on liability by the arbitrator is a decision on the substance of dispute between the parties. However, it does not entitle the arbitrator to proceed with the determination of quantum until a written award on liability is given as mandatorily required under the AA 2005. We hereby

make the following orders as prayed by the appellant in the OS (encl 34 in the common core bundle Vol 1):

(a) the oral decision delivered by the arbitral tribunal on 26 June 2020 in respect of Telekom's and Obnet's liability is invalid; and

(b) Obnet (whether by themselves, their officers, directors, employees, servants, principals or agents, nominees or otherwise) be forthwith restrained form taking any further steps, either directly or indirectly, to proceed with the arbitration proceedings between Telekom and Obnet, until the arbitrator duly publishes an award on its determination on the issue of liability of the parties in respect of the claim and counterclaim, in compliance with ss 2 and 3 of the AA 2005 and art 34 of the UNCITRAL Arbitration Rules, adopted by the Rules for Arbitration of the Kuala Lumpur Regional Centre for Arbitration.

[55] Given that the arbitration in this appeal commenced in 2016 and the decision on liability was pronounced orally in 2020 it is necessary and appropriate that the arbitrator publish the award on liability in writing as required under the AA 2005 as soon as reasonably possible. The proceedings on the assessment of damages is, therefore, stayed until the arbitrator publishes the written award on liability.

[56] After hearing parties on the issue of costs we ordered costs of RM150,000 to be paid to Telekom by Obnet subject to allocator. The sum of RM80,000 paid by Telekom as costs in the courts below to be refunded by Obnet to Telekom within 14 days from the date of this order.

[57] My learned brothers, Abdul Rahman Sebli Chief Judge of Sabah and Sarawak, and Abdul Karim Abdul Jalil FCJ have sight of the judgment in draft, concur with the reasons given and the conclusions reached.

Order accordingly.

Reported by Ashok Kumar